

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 August 2011

Public Authority: Intellectual Property Office
Address: Concept House
Cardiff Road
Newport
South Wales
NP10 8QQ

Summary

The Secretary of State for Defence provides the Intellectual Property Office (IPO) with a list of technologies that could be considered prejudicial to national security or public safety. If the IPO receives a patent application for an invention employing any of the technology on the list it can issue directions under the Patents Act 1977 which restrict the publication of the patent. The complainant requested a copy of the list notified to the IPO by the Secretary of State. The IPO initially withheld this list under section 24(1) of the Freedom of Information Act. During the course of the Commissioner's investigation the IPO disclosed a redacted version of the list. The Commissioner has concluded that the IPO is entitled to rely on section 24(1) to withhold the redacted parts of the list.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The Intellectual Property Office (IPO) checks every patent application filed to identify whether it should be placed under directions according to section 22 of the Patents Act 1977. Such directions can restrict the publication of details of the patent if its publication could be considered prejudicial to national security or the safety of the public. The

Secretary of State for Defence notifies the IPO as to the types of technologies which could be considered prejudicial to national security or public safety. The IPO publishes a guide to what these technologies are on its website but does not publish the actual list notified by Secretary of State.¹

The Request

3. The complainant submitted the following request to the IPO on 17 December 2010:

'I would be grateful if you could provide the description notified to the Comptroller by the Secretary of State under Section 22(1) of the Patents Act 1977.'

4. The IPO responded on 19 January 2011 and explained that it believed that the requested information was exempt from disclosure on the basis of section 24(1) of the Act because its disclosure may be prejudicial to national security. The IPO did however provide the complainant with a link to the guide it published on its website about the list notified by the Secretary of State, i.e. the one referenced in the Background section above.
5. The complainant contacted the IPO on 31 January 2011 and asked for an internal review of this decision to be undertaken.
6. The IPO informed him of the outcome of the review on 28 February 2011; the review upheld the application of section 24(1).

The Investigation

Scope of the case

7. The complainant contacted the Commissioner on 14 March 2011 in order to complain about the IPO's refusal to provide him with the information that he had requested. The complainant argued that the IPO had failed to explain why disclosure of the information he requested would harm national security.
8. As noted in the Chronology section below during the course of the Commissioner's investigation, the complainant was provided with a

¹ The published guide can be viewed here: <http://www.ipo.gov.uk/p-securitylist.pdf>

redacted version of the list. However, the complainant disputes the IPO's reliance on section 24(1) of the Act to withhold the redacted information. This Notice therefore addresses the application of section 24(1) to withhold the redacted sections of the list.

Chronology

9. The Commissioner contacted the IPO on 25 March 2011 in order to ask for a copy of the information requested by the complainant.
10. The IPO provided the Commissioner with this information on 7 July 2011.
11. Having reviewed this information the Commissioner contacted the IPO on 13 July 2011 and asked it to provide further clarification as to why it believed section 24(1) provided a basis to withhold the requested information. The Commissioner also asked the IPO to consider whether it would provide the complainant with a redacted version of the list.
12. The IPO contacted the Commissioner on 26 July 2011 and provided him with a redacted version of the requested information which it explained it was happy to disclose to the complainant.
13. The complainant was provided with this information on 27 July 2011.
14. The IPO provided the Commissioner with further submissions to support its application of section 24(1) on 10 August 2011.

Analysis

Exemptions

Section 24 – national security

15. Section 24(1) of the Act states:

'Information which does not fall within section 23(1) (Listed Security Bodies) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.'

16. The term 'required' is not defined within the Act and the Commissioner's view concerning the degree to which the section 24 exemption is required for the purposes of safeguarding national security has evolved with experience in applying the Act to specific cases. The Commissioner had previously taken the view that for the exemption to apply there must be evidence of specific and real threats

to national security. He now accepts that that threshold was too high and that there does not need to be evidence of a direct or imminent threat. The Commissioner has drawn on the approach set out by the House of Lords in a non-freedom of information case, *Secretary of State for the Home Department v Rehman* (Lord Slynn at paragraph 16:

'To require the matters in question to be capable of resulting 'directly' in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected. I accept that there must be a real possibility of an adverse effect on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate'.

17. He added:

'If an act is capable of creating indirectly a real possibility of harm to national security it is in principle wrong to say that the state must wait until action is taken which has a direct effect against the United Kingdom.'

18. Therefore the Commissioner now interprets required in the context of section 24 to mean 'reasonably necessary'. In effect this means that there has to be a risk of harm to national security for the exemption to be relied upon but there is no need for a public authority to prove that there is specific, direct or imminent threat.

19. The IPO informed the complainant that disclosure of the withheld information would place into the public domain details of specific types of technology that are of interest to foreign countries and terrorist organisations. Consequently, disclosure of this information could pose a threat to national security.

20. In submissions to the Commissioner to support its decision to disclose only a redacted version of the list, the IPO elaborated as to how this potential threat to national security could arise: it explained that the redacted information contained very specific details that would, if released into the public domain, provide knowledge to assist potentially hostile third parties either in developing military technology or developing countermeasures against UK military technology. In addition to this overarching reason, the IPO provided the Commissioner with a number of specific examples of how the content of the redacted information could lead to these effects occurring. The Commissioner does not consider it appropriate to include this more

detailed reasoning in the main body of this notice but has reproduced it in the confidential annex, available to the public authority only.

21. Having considered the IPO's explanation for relying on section 24(1), in particular the reasons identified in the confidential annex, and taking into account threshold for engaging the exemption, the Commissioner is satisfied that the requested information is exempt from disclosure under section 24(1). The IPO is therefore entitled to rely on the exemption for the purpose of safeguarding national security.
22. The Commissioner appreciates that by including such analysis in the annex the complainant is not able to fully understand the Commissioner's basis for reaching this conclusion. However, in cases such as this where a public authority's reasoning as to why an exemption applies includes references to the content of the sensitive information itself, the Commissioner believes that such an approach cannot be avoided.
23. Although the Commissioner has concluded that the exemption is engaged, section 24 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

24. The IPO argued that there was a clear public interest in protecting the government's ability to safeguard national security.

Public interest arguments in favour of disclosing the requested information

25. The IPO acknowledged that it was important that the public understood the patents system, how it works and with particular relevance to section 22 of the Patents Act, the types of invention which may be subject to restricted disclosure.
26. The complainant argued that as the issuance of a section 22 order under the Patents Act can make the difference between a financially viable project and a liability, it was in the public interest for the IPO to disclose as much information as possible about the types of inventions which may be subject to such restrictions.

Balance of the public interest arguments

27. The Commissioner accepts that there is a general public interest in public authorities being open and transparent about the processes by which they make decisions. Disclosure of the redacted information

would clearly further inform the public about how the IPO makes decisions in respect of the section 22 of the Patents Act. The Commissioner agrees with the complainant that disclosure of the redacted information could usefully inform those with an interest in this field of work, both patent attorneys and those involved in developing inventions which may involve technologies such as those contained in the redacted information.

28. However, the Commissioner considers that there is very strong public interest in ensuring that the UK's national security is not compromised by the disclosure of information under the Act. In the particular circumstances of this case the IPO has identified not just one but a number of specific ways in which the UK's national security could be harmed if the redacted information was disclosed (i.e. the details set out in the confidential annex). In light of these arguments and the inherently strong public interest in protecting national security, the Commissioner has concluded that the public interest in maintaining the exemption clearly outweighs the public interest in disclosing the redacted information.

The Decision

29. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Right of Appeal

30. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

31. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 30th day of August 2011

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

National Security

Section 24(1) provides that –

“Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.”